

Missouri Law Review

Volume 30
Issue 4 *Fall 1965*

Article 5

Fall 1965

Recent Cases

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Recommended Citation

Recent Cases, 30 Mo. L. REV. (1965)

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Recent Cases

CIVIL PROCEDURE—THE ACTIVE-PASSIVE NEGLIGENCE INDEMNITY THEORY

*Listerman v. Day and Night Plumbing & Heating Serv.*¹

Defendant Day and Night contracted to install a "free standing fireplace heater" in plaintiff Listerman's house. The job required sheet metal work in running a flue pipe, so Day and Night subcontracted with Empire Sheet Metal Company to make the actual installation. No employees of Day and Night were present when Empire made the installation. However, Day and Night inspected and approved the finished work at plaintiff's request. Shortly after the heater was lit for the first time, fire broke out in the roof of the house in the vicinity of the flue pipe causing over \$1,000 damage. Plaintiff sued Day and Night alleging negligence in failing to properly insulate the flue pipe near the roof level. Day and Night impleaded Empire as third-party defendant asserting a right to indemnity. The court sitting as a jury gave plaintiff judgment for \$1,250 against Day and Night, and gave Day and Night a judgment for the same amount plus attorney's fees against Empire. Plaintiff Listerman's judgment was satisfied by Day and Night, but Empire appealed to the Springfield Court of Appeals after its motion for a new trial was denied.

The court of appeals affirmed, holding this a proper case for indemnity. It found Empire's status to be that of an independant subcontractor, and that plaintiff's recovery was based "upon negligence imputed to Day and Night by reason of its legal relation with Empire."² Day and Night's negligence in not discovering the dangerous condition was not alleged by plaintiff, but the court noted that under Missouri law negligence consisting solely in failure to discover and correct a dangerous condition will not preclude indemnity.³ While this analysis would have been adequate to support the decision, the court also used a distinction between active and passive negligence as a basis for indemnity—Day and Night was entitled to indemnity because only "passively" negligent while Empire was the "actively" negligent wrongdoer.⁴ Unfortunately the court followed the example of the authority it cited by using the terms without defining them. The use of the additional "theory" in this situation points out the confusion surrounding the whole active-passive negligence approach to indemnity cases. The question presented is whether this approach is actually a separate indemnity theory based on some dif-

1. 384 S.W.2d 111 (Spr. Mo. App. 1964).

2. *Id.* at 118.

3. *Ibid.*

4. *Ibid.*

ference in degree or kind of negligence, or whether the terms are merely intended to cover a variety of indemnity situations without detailed legal analysis.

A non-contractual right to indemnification arises where one person is subjected to liability because of the conduct of another person, rather than because of his own personal negligence.⁵ This liability, variously called "constructive," "derivative," or "secondary" liability, allows indemnification under theories of implied contract, quasi-contract, or implied warranty.⁶ Secondary liability arises in three situations: "(1) liability imposed because of legal relations with the one primarily liable; (2) some positive rule of common or statutory law; or (3) a failure to discover or correct a dangerous condition."⁷ In *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Printing Co.*⁸ the Missouri Supreme Court recognized these main categories and followed the Restatement in putting indemnity on a principle "similar to a quasi-contractual basis."⁹ In the course of its analysis the court also reviewed theories used by other states, including the active-passive negligence theory, and decided none were satisfactory.¹⁰

The use of the distinction between active and passive negligence as a basis for indemnity is a recent development in the Missouri cases.¹¹ After previously

5. 1 HARPER & JAMES, TORTS § 10.2, at 723 (1956); PROSSER, TORTS § 48, at 279 (3d ed. 1964).

6. Wright, *Procedure—Third Party Practice—Non-Contractual Indemnification*, 28 Mo. L. REV. 307, 308 (1963).

7. *Id.* at 309.

8. 323 S.W.2d 788 (Mo. 1959).

9. *Id.* at 793; RESTATEMENT, RESTITUTION §§ 76, 95, 96 (1937).

10. *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Printing Co.*, *supra* note 8, at 793.

11. It should be noted that the active-passive negligence terminology has long been used in Missouri in describing the liability of a tortfeasor to an injured party, particularly in the area of the land owner's duties to persons on the premises. In *Wolfson v. Chelist*, 278 S.W.2d 39 (St. L. Mo. App. 1955), *aff'd*, 284 S.W.2d 447 (Mo. 1955), a social guest slipped on a grease spot on the host's porch and was injured. In reversing the trial court's judgment for the guest the St. Louis Court of Appeals said: "'Active negligence' is negligence occurring in connection with activities conducted on the premises, whereas 'passive negligence' denotes negligence which permits or causes dangers upon the property." 278 S.W.2d at 47. A similar view was expressed in *Anderson v. Cinnamon*, 282 S.W.2d 445, 450 (Mo. En Banc 1955), when the court noted that "the failure to warn is negative rather than active in its nature." In this context the terms active and passive negligence are used to describe the type of physical acts giving rise to liability. Active negligence requires affirmative conduct that directly causes the injury, while passive negligence embraces creation of or failure to correct a dangerous condition. Depending on the duty he owes to the injured plaintiff, a defendant could be passively negligent in one sense, yet primarily liable, as in the case of an invitee injured by a dangerous condition on the defendant's premises. The courts apply another meaning to the term "passive negligence" in the indemnity situation, because when used in indemnity cases it is equated with secondary liability. A defendant cannot be both primarily liable and passively negligent where indemnity is the issue—if passively negligent his liability is treated as though it were secondary or derivative, while the "actively negligent" third-party defendant is treated as the primarily liable party. It is on this basis that indemnity is granted. See also RESTATEMENT (SECOND), TORTS § 441, comment *b* (1965), for the use of active-passive negligence terminology in relation to an intervening force situation.

discussing but refusing to use the active-passive negligence approach in the *McDonnell* case, the Missouri Supreme Court used this language in *Kansas City So. Ry. Co. v. Payway Feed Mills, Inc.*¹² when it stated "the negligence of the party responsible for the dangerous condition is active and primary while the negligence of the other is passive and secondary."¹³ Whether the terms active and passive negligence were used as synonyms for primary and secondary liability for the purpose of emphasis, or whether they were intended as a supplemental indemnity theory based on an actual difference in kind or degree of negligence was not made clear. The court seemed to retreat from these terms in *Crouch v. Tourtelot*¹⁴ when it observed that even though discussions of active and passive negligence may occasionally appear in the cases, "it will be found in at least the vast majority of our cases, when the facts are accurately evaluated, that indemnity has been allowed in favor of one who is held responsible solely by imputation of law because of his relation to the actual wrongdoer."¹⁵ The active-passive negligence distinction was used again in *Woods v. Juvenile Shoe Corp.*,¹⁶ but there it was related to the *acts* from which liability arose—actively creating a dangerous condition was active negligence while failing to discover a dangerous condition was mere passive negligence.¹⁷ Subsequent decisions have done little to clarify the situation, and the exact status of the terms is still uncertain.¹⁸

A number of other jurisdictions have attempted to solve their indemnity problems through the use of active and passive negligence, but the results have in general been less than satisfactory. The New York courts, the pioneers in the use of this terminology, have given various statements of the "theory," all of which

12. 338 S.W.2d 1 (Mo. 1960).

13. *Id.* at 5.

14. 350 S.W.2d 799 (Mo. En Banc 1961).

15. *Id.* at 805.

16. 361 S.W.2d 694 (Mo. 1962).

17. *Id.* at 697. The court held the shoe manufacturer was actively negligent in creating a dangerous condition by leaving a nail protruding into the shoe, while the retailer was only passively negligent in failing to inspect and discover the danger.

18. In *Johnson v. California Spray-Chem. Co.*, 362 S.W.2d 630 (Mo. 1962), indemnity was denied because the third-party plaintiff was guilty of active negligence. A later case, *Union Elec. Co. v. Magary*, 373 S.W.2d 16, 22 (Mo. 1963), was distinguished from *Payway* "on the same grounds and for the same reasons given in *Crouch v. Tourtelot*, namely, that Union Electric's negligence was active . . . not merely a failure to discover and correct" the dangerous condition. It is interesting to note that the court in *Union Elec.* quoted *Crouch* with approval and distinguished *Payway* but still used active-passive negligence. The court hearing *Pierce v. Ozark Border Elec. Coop.*, 378 S.W.2d 504, 508 (Mo. 1964), stated the case before it was not distinguishable from *Union Elec.*, but no indemnity was allowed because the case involved joint tort-feasors, "both under a common liability and not a primary and secondary one." *Campbell v. Preston*, 379 S.W.2d 557, 559 (Mo. 1964), contains a good discussion of various indemnity situations without use of active-passive negligence terminology. The court summarized: "As a general rule, indemnity is allowed in favor of one who is held responsible *solely* by imputation of law because of his relation to the actual wrongdoer, as where an employer is vicariously liable for the tort of an employee or in favor of one who was under a secondary duty where another was primarily responsible."

make it clear that it is the nature of the liability rather than the type of physical acts giving rise to liability that is being described.¹⁹ However, even consistent use of the active-passive negligence approach to indemnity has not eliminated the confusion as to meaning because the terms have been applied in too many varied situations.²⁰ One writer went so far as to conclude "the resulting tangle which is the New York law of indemnity is reason enough for any court to steer clear of the use of the 'passive-active' formula."²¹ A federal court in Michigan may have pointed the way to the solution when it stated "a person is passively negligent only when he did not participate in the commission of the tort; and his liability arises only by operation of law."²² This approach equates passive negligence with secondary or derivative liability and is consistent with several other jurisdictions.²³

What the Missouri courts mean when using active-passive negligence as a basis for indemnity remains uncertain. If this is indeed a distinct theory based on either varying kinds or degrees of negligence the court should make this clear. If, as is more probable, the terms are merely synonyms for other terms long in use such as primary-secondary liability, then they serve no useful purpose. In fact, if the latter is true they actually add confusion because what is being described is not differing types or degrees of negligence, but a basis of liability arising by operation of law. The *Listerman* case is a good illustration of why clarification is badly needed because while the court recognized that Day and Night was liable merely due to operation of law—the legal relation between contractor and employer—it still went on to discuss active and passive negligence. Day and Night was liable because of a contract relation, and its personal negligence was not an issue in the case. The discussion of negligence merely added verbage without adding clarity.

THOMAS J. ENIS

19. E.g., *Jackson v. Associated Dry Goods Corp.*, 13 N.Y.2d 112, 116, 242 N.Y.S.2d 210, 213 (1963) ("Active negligence, however, is not determined by whether the conduct of the party seeking indemnification is affirmative or permissive, for acts of omission as well as acts of commission may constitute active negligence."); *Putvin v. Buffalo Elec. Co.*, 5 N.Y.2d 447, 456, 158 N.E.2d 691, 696 (1959) ("Either a fault of omission or one of commission may constitute active negligence."); Note: *Indemnity Among Joint Tortfeasors in New York: Active and Passive Negligence and Impleader*, 28 *FORDHAM L. REV.* 782, 786-788 (1960).

20. See Note: *Indemnity Among Tortfeasors in New York*, 39 *CORNELL L.Q.* 484, 499 (1954); Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 *IOWA L. REV.* 517, 537 (1952); Meriam & Thornton, *Indemnity Between Tortfeasors: An Evolving Doctrine in the New York Court of Appeals*, 25 *N.Y.U.L. REV.* 845, 858 (1950).

21. Davis, *supra* note 20, at 539.

22. *Pelkey v. States Sales*, 210 F.Supp. 924, 925 (E.D. Mich. 1962).

23. E.g., *Chicago & Illinois Midland Ry. Co. v. Pillsbury Mills, Inc.*, 47 Ill. App. 2d 373, 377, 198 N.E.2d 126, 129 (1964); *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Travelers Ins. Co.*, 233 Md. 205, 215, 196 A.2d 76, 81 (1963).

CORPORATIONS—DIRECTORS' CONTRACTS WITH THE CORPORATION
—BURDEN OF PROOF*Binz v. St. Louis Hide and Tallow Co.*¹

Plaintiff, who was a minority shareholder in St. Louis Hide and Tallow Company, brought suit on behalf of the corporation and himself to recover salaries which the directors of the corporation voted to themselves. The principal defendants were three shareholders who constituted three of the four members of the board of directors of the defendant corporation and were also its officers. The board set the salary of the president at \$6000 per year, and then delegated to him the authority to set the other officers' salaries. The president set the salaries of the vice-president and the secretary at \$6000 per year. Plaintiff brought suit in the circuit court of St. Louis to compel the three individual defendants to account for the salaries paid them. The circuit court found that, since the plaintiff had not proved that the salaries paid to the defendants were unreasonable and it was the plaintiff's burden to do so, the defendants need not account to the corporation for salaries paid them. Plaintiff appealed on the grounds that the burden of proof on the reasonableness of the salaries should have been on the defendants. The St. Louis Court of Appeals reversed the circuit court and held that the burden was on the defendants.

According to the great weight of authority in Missouri, contracts between a corporation and one or more of its directors are voidable at the option of the corporation, where the interested director's presence was necessary to constitute a quorum or where his vote was necessary to approve the contract.² This rule has been applied without regard to whether the contract was reasonable or fair to the corporation.³ It is immaterial that the corporation was not harmed by the transaction or that the director acted with utmost good faith.⁴ A director is regarded as occupying a fiduciary relationship to his corporation, and may not deal with the property of his *cestui que trust* for his own benefit. A strict rule is deemed necessary to prevent unfairness or fraud by the director. However, where the corporation is represented by a disinterested majority of the board, the rule is otherwise. In such a case, the contract with the director may be avoided only if it is unfair to the corporation or entered into in bad faith.⁵ The possibility of unfairness is greatly reduced where the corporation is represented by an independent majority.

The problem of deciding what constitutes a disinterested majority of the board of directors has been difficult in some cases. For example, in *Funsten v.*

1. 378 S.W.2d 228 (St. L. Mo. App. 1964).

2. *Glassburn v. Lakeland Dev. Co.*, 340 S.W.2d 641 (Mo. 1960); *Frankford Exchange Bank v. McCune*, 72 S.W.2d 155 (St. L. Mo. App. 1934); *Hill v. Rich Hill Coal Mining Co.*, 119 Mo. 9, 24 S.W. 223 (1893); *R. T. Davis Mill Co. v. Bennett*, 39 Mo. App. 460 (K.C. Ct. App. 1889).

3. *Hill v. Rich Hill Coal Mining Co.*, *supra* note 2.

4. *Bromschwig v. Carthage Marble & White Lime Co.*, 334 Mo. 319, 66 S.W.2d 889 (1933).

5. *Kitchen v. St. Louis, K.C. & No. Ry.*, 69 Mo. 224, 254 (1878).

Funsten Comm'n Co.,⁶ the three directors of defendant, *A*, *B*, and *C*, who were also its officers, met to fix salaries. *B* and *C* fixed *A*'s salary. Then *A*, *B*, and *C* voted affirmatively for a resolution setting the salaries of *B* and *C*. The St. Louis Court of Appeals said the salaries of *B* and *C* were validly set because the portion of the resolution by which *B*'s salary was set might well have been supported by the affirmative votes of *A* and *C*, two disinterested directors. The court ignored the fact that *C* would be interested in passing the resolution because it also set his salary, and that *A* would be interested because his salary may have depended on his support of the salaries of *B* and *C*. The court, in the noted case, chose to ignore the *Funsten* holding. It considered the action of the board in setting the president's salary, together with the delegation to him of the authority to set their salaries, as "self-dealing." This strongly indicates that the *Funsten* case will be ignored in Missouri.⁷

Once it has been disclosed that the corporation was not represented by a disinterested majority of the board in dealing with a director, the dealing is voidable without inquiry into its fairness, according to the majority view. However, there is now authority in Missouri for the view that even where a corporation is not represented by a disinterested majority, contracts between the corporation and an interested director can be avoided only if unfair to the corporation. This would place Missouri in line with the so-called "enlightened minority."⁸ In *Yax v. Dit-Mco, Inc.*,⁹ the Missouri Supreme Court upheld a sale of shares to the corporation where two out of five directors of the corporation were personally interested in the sale and one of their votes was necessary to pass the resolution authorizing the sale, since one of the non-interested directors abstained. A disinterested majority of the board was not possible. The court chose not to mention this fact, when they could easily have held the transaction void for want of a disinterested majority. They looked instead at the fairness of the transaction, and said, "The board of directors could properly authorize the Company to purchase the shares it did purchase for a fair and reasonable price (conceded in this case) where it appears that the transaction was entered into in good faith and considered to be in the best interests of the Company."¹⁰ This holding is a departure from previous Missouri cases, and from what is regarded as the majority view throughout the country, as to contracts made where a disinterested majority of directors is not present. The court in the noted case strongly endorsed the view that such contracts will be sustained if fair. It recognized that the directors had dealt with themselves, but stated "whether or not the corporation suffered any detriment is the ultimate issue."¹¹

If a transaction between a corporation and an interested director is challenged

6. 67 Mo. App. 559 (1896).

7. See *Steele v. Gold Fissure Gold Mining Co.*, 42 Col. 529, 95 Pac. 349 (1908), criticizing *Funsten*.

8. Comment, 19 CALIF. L. REV. 304, 305 (1931).

9. 366 S.W.2d 363 (Mo. 1963), noted in Brauning, *Corporations—Interested Directors Dealing with the Corporation*, 29 Mo. L. Rev. 90 (1964).

10. *Id.* at 367.

11. *Binz v. St. Louis Hide and Tallow Co.*, *supra* note 1, at 231.

by the corporation or by a shareholder in a derivative suit, where should the burden of proof on the issue of fairness of the contract lie? The courts generally place upon the interested director the burden of proving the contract fair if he wishes to uphold it.¹² The reason for the rule seems to lie in the fiduciary relationship of a director to his corporation. The law imposes upon him a duty to act with the utmost good faith and to exercise the powers given him solely in the interests of the corporation and its shareholders, and not in his own interest.¹³ It is assumed that if a director represents both himself and the corporation in a transaction in which their interests are adverse, he will favor his own interests over those of the corporation. It is well established that because of his fiduciary relationship with the corporation, a director should not profit by dealing with it.¹⁴ However, this strict rule that a director cannot profit from dealings with his corporation seems to have been changed by the more liberal holdings such as *Yax v. Dit-Mco, Inc.* A director may profit if the corporation also profits at the same time. But since the director profits from the transaction, he should bear the burden of proving that the corporation has been fairly dealt with, since his duty is first and foremost to uphold the interests of the corporation.

A distinction is not made between the cases in which the corporation is represented by a disinterested majority and quorum and those in which it is not, in determining where the burden of proving fairness will be. Where there is a disinterested majority and quorum, the majority of cases still place the burden of proving the contract's fairness on the interested director.¹⁵ However, there is respectable authority to the contrary,¹⁶ and it is arguable that the corporation is adequately protected when a majority of disinterested directors is representing it. But this argument has no validity where there is no disinterested majority to protect the corporation. If fair contracts between an interested director and his corporation are to be upheld where the corporation is not represented by a disinterested majority, the reason and necessity for the rule placing the burden of showing fair-

12. *E.g.*, *Brown v. Grand Rapids Parlor Furniture Co.*, 58 Fed. 286, (6th Cir. 1893) (corporation giving preference to director-creditor over other creditors); *Gropper v. North Cent. Texas Oil Co.*, 35 Del. Ch. 198, 114 A.2d 231 (1955) (corporation selling property to or buying property from director); *Fountain v. Oreck's, Inc.*, 245 Minn. 202, 71 N.W.2d 646 (1955) (directors establishing their own compensation); *Minnesota Loan & Trust Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N.W. 255 (1916) (director lending money to the corporation and taking security from it).

13. 19 AM. JUR. 2d *Corporations* § 1272 (1965).

14. *Dawson v. National Life Ins. Co.*, 176 Iowa 362, 157 N.W. 929 (1916).

15. *Bromschwig v. Carthage Marble & White Lime Co.*, *supra* note 4; *Pitman v. Chicago Lead Co.*, 93 Mo. App. 592, 67 S.W. 946 (1902), *aff'd* on rehearing 113 Mo. App. 513, 87 S.W. 10 (1905). See MICH. STAT. ANN. § 21.13(5) (1963), which expressly provides that no contract shall be invalid because made with a director, but puts the burden upon the director to prove that it is fair. However, *Veese v. Robinson Hotel Co.*, 275 Mich. 133, 266 N.W. 54 (1936), limits the rule permitting a director of a corporation to deal with it to cases where the corporation is represented by a majority of disinterested directors.

16. *Speigel v. Beacon Participations*, 297 Mass. 398, 8 N.E. 2d 895 (1937); *Seitz v. Union Brass and Metal Mfg. Co.*, 152 Minn. 460, 189 N.W. 586 (1922). See Annot., 27 A.L.R. 300 (1923) and cases cited therein.

ness on the director is even more compelling, in view of the possibilities of unfairness and overreaching in unrestricted dealings. This is the rule which the court in the noted case adopts. Such a rule seems absolutely essential if Missouri is to follow the rule that contracts between an interested director and his corporation can be upheld if they are fair, where there is no disinterested majority to protect the interests of the corporation.

HADLEY E. GRIMM

INSURANCE—ACCIDENTAL DEATH—DANGEROUS ACT
AS BAR TO RECOVERY

*Applebury v. John Hancock Mut. Life Ins. Co.*¹

Insured died when his Buick automobile struck another automobile as the latter pulled from a service station into the path of insured. Insured was fleeing the police, driving 60 to 90 miles per hour at 1:00 a.m. on a city street in Kansas City.

In this suit for the double indemnity on a policy insuring against "death . . . by external, violent and accidental means" insurer contended that insured died as a result of voluntarily and wantonly exposing himself to unnecessary and known danger, and therefore, that his death did not result from accidental means. The policy contained several specific exclusions, but it did not exclude voluntary exposure to danger.²

The trial court instructed the jury that in order to find for defendant-insurer it must determine that (1) the insured must have reasonably anticipated death or injury as the natural and probable consequence of his act and that (2) the insured died as the result of exposing himself to unnecessary and known danger. The court entered judgment on a verdict for defendant-insurer. Plaintiff-beneficiary appealed. The Kansas City Court of Appeals affirmed the decision saying that this act of driving constituted voluntary exposure to danger.³

The basic problem is whether the death of the insured was accidental. All deaths must be classified as (1) natural, (2) intentional or (3) accidental. Those caused by insured's conduct can be only intentional or accidental. To determine which, Missouri courts ask if, during his act, insured should have reasonably an-

1. 379 S.W.2d 867 (K.C. Mo. App. 1964).

2. The insurer also contended that insured was committing an assault, and that he was committing a felony at the time of his death. These two defenses, however, were based on specific policy exclusions.

3. The court also said there was persuasive evidence that insured was guilty of assault and manslaughter.

ticipated and foreseen, as a natural and probable consequence thereof, that he was likely to sustain bodily injury or death.⁴ This elucidates the basic definition of an "accident" which is often stated as something unexpected, unusual and unforeseen.⁵ In *Applebury* the insured should have reasonably foreseen some risk of possible injury, but he should not have expected that risk to be the usual result of his conduct. To be usual, a result, here injury or death, would have to occur most of the time. Reckless driving only rarely results in death or injury. Most reckless drivers go unharmed. This is not to say that the possibility of death is no greater where reckless driving occurs than where it does not; however, such increase is not great enough to say that a driver should expect death as the usual result of reckless conduct.

Most cases with facts similar to those in *Applebury* have held that the death was accidental and that there was not an adequate showing that the insured expected death from his conduct. One such Missouri case is *Ward v. Penn Mut. Life Ins. Co.*⁶ There, the insured, after leaving a tavern, rode "spread eagle" on top of an automobile, fell off and was killed. The Springfield Court of Appeals affirmed a finding of death by accidental means because the insured had previously ridden "spread eagle" on top of an automobile without a mishap. Therefore, the insured should not have reasonably foreseen any harm as a consequence of his act. In *Rogers v. Reserve Life Ins. Co.*⁷ an insured drove 100 miles per hour after being warned of an upcoming curve. The car missed the curve and the insured was killed. In finding that the death was accidental the Illinois court said:

There is no evidence from which one would be justified in concluding that the insured expected that he could not negotiate this curve or that his own fast driving would result in his own death. . . .⁸

In *Metropolitan Life Ins. Co. v. Henkel*⁹ an insured was killed in an automobile wreck after a ninety miles per hour police chase. The United States Court of Appeals for the Fourth Circuit ruled that the death was "clearly the result of accidental means."¹⁰ A Georgia court in *Life & Cas. Ins. Co. of Tenn. v. Benion*¹¹ held that an insured's death which occurred as a result of his driving in a stock car race was an accidental death. In a later Georgia decision, *Union Cent. Life Ins. Co. v. Cofer*,¹² an insured drank liquor, wrecked his automobile and died. Upon defendant-insurer's admission that there was no suicide, the court said that

4. *Applebury v. John Hancock Mut. Life Ins. Co.*, 379 S.W.2d 867, 873 (K.C. Mo. App. 1964); *Ward v. Penn Mut. Life Ins. Co.*, 352 S.W.2d 413, 421 (Spr. Mo. App. 1961).

5. *Tomnitz v. Employers' Liability Assur. Corp.*, 343 Mo. 321, 330, 121 S.W.2d 745, 749 (1938). See generally 1A APPLEMAN, INSURANCE LAW & PRACTICE § 391 (1964).

6. 352 S.W.2d 413 (Spr. Mo. App. 1961).

7. 8 Ill. App. 2d 542, 132 N.E.2d 692 (1956).

8. *Id.* at 550, 132 N.E.2d at 696.

9. 234 F.2d 69 (4th Cir. 1956).

10. *Id.* at 70.

11. 82 Ga. App. 571, 61 S.E.2d 579 (1950).

12. 103 Ga. App. 355, 119 S.E.2d 281 (1961).

this admission, ". . . standing alone practically if not completely eliminated any question but that [the insured] met his death by accident or accidental means."¹³

As a practical matter, *Applebury* might be distinguishable from the other above cases because it was an appeal from a verdict for the defendant-insurer. The other above cases were appeals from verdicts for the plaintiffs-beneficiaries. The question of accidental death is one of mixed law and fact, and an appellate court is sometimes more reluctant to upset the lower court's fact finding than to affirm it. Often appellate courts affirm accidental death cases not on the basic and vital issue of the accident itself, but on petty issues such as the distinction between accidental death and accidental means.¹⁴

In addition to the issue of accident just discussed, the court needs to decide only those matters specifically put forth by the policy. One such matter may be exposure to danger.¹⁵ In *Applebury*, the policy was silent as to exposure to danger. However, the court specifically required the jury to determine if insured died from voluntarily exposing himself to danger.

The question of exposure to danger, while relevant to the issue of accident, is not an issue itself unless stated in the policy and asserted in the defense. When the policy is silent on the question of exposure to danger, and exposure to danger is made an issue, it unduly prejudices the plaintiff because most contested accident claims involve some exposure to danger by the insured. Thus the jury will most likely rule against the plaintiff on this point. The jury then must consider the issue of accident. Having ruled against the plaintiff once, the jury would be more likely to rule against him on the "accident" question than they would if he had not already lost one decision. Their natural inclination would be to duplicate their first decision because the second point is related thereto.

In addition to its lack of logic, making exposure to danger an issue when not mentioned in the policy is not the law in Missouri. The Supreme Court of Missouri, in *Callahan v. Connecticut Gen. Life Ins. Co.*,¹⁶ held that without a policy exclusion an insured's negligence, intoxication or lack of judgment was not itself

13. *Id.* at 359, 119 S.E.2d at 285.

14. *Caldwell v. Travelers Ins. Co.*, 305 Mo. 619, 267 S.W. 907 (En Banc 1924). For a complete and able discussion of the impractical distinction between accidental means and accidental result, see Pener, *Insurance-Accident-Voluntary Exposure To Danger*, 23 Mo. L. Rev. 89 (1958).

15. Even when exposure to danger is a specific policy exclusion, Missouri courts are not uniform as to what degree of misconduct is necessary to bar recovery. *E.g.*, *Landau v. Travelers Ins. Co.*, 315 Mo. 760, 287 S.W. 346 (En Banc 1926); *Bateman v. Travelers Ins. Co.*, 110 Mo. App. 443, 85 S.W. 128 (St. L. Ct. App. 1905) (due care was required); *Dillon v. Continental Cas. Co.*, 130 Mo. App. 502, 109 S.W. 89 (K.C. Ct. App. 1908) ("mere negligence" did not bar recovery). For other courts' interpretations of this exclusion when stated in the policy, see 45 C.J.S. *Insurance* § 774 (1946), 29A AM. JUR. *Insurance* § 1175 (1960), and 10 ANDERSON, COUCH ON INSURANCE 2d §§ 41.474-495 (1962).

16. 357 Mo. 187, 196, 207 S.W.2d 279, 285 (1947). Rarely do the accidental death cases get to the Supreme Court because most double indemnity provisions are \$10,000 or less and thus the amount in issue does not meet the \$15,000 minimum for Supreme Court jurisdiction. This case got up only because it contained a constitutional question.

in issue. The court did, however, refuse plaintiff a cautionary instruction to this effect solely because the jury might then totally exclude the negligence, intoxication and lack of judgment from consideration while these matters were still relevant to the decisive issue of accident. In this case the insured remained in his automobile in freezing weather and died after he froze his feet. He had consumed a considerable amount of liquor. In *Ward v. Penn Mut. Life Ins. Co.*¹⁷ the Springfield Court of Appeals followed the Supreme Court by holding that without a policy exception, voluntary exposure to danger would not affect submissibility of the case on the question of accident. Other courts have agreed by saying:

Voluntary exposure to danger by the holder of an accident policy will not defeat recovery for an injury caused by accidental means, where such exposure is not an exception in the policy, and the insured has no intention of producing the injury received.¹⁸

Courts rarely inject matters into issue that are not specifically required by the policy of insurance. When they do, it is likely that it is because they confuse a relevant fact, here exposure to danger, with a necessary element of an issue. Consequently, they prejudice a jury by making an issue out of what is merely a relevant fact.

Concluding, it seems that the Kansas City Court of Appeals has blurred the line separating accidental from intentional deaths to the point that there is an area between the two that can only be defined as death not intentional but not within the area of accident either. The best way to exclude certain accidental deaths from accident insurance coverage is to insert a specific exclusion in the policy instead of judicially taking the meaning out of the term "accident."

It would be most helpful for the Supreme Court of Missouri to emphasize the meaning of the presence or absence of certain exclusions in contracts of insurance and to declare again that only those items the insurer expressly excluded will be in issue and not items the insurer wishes he had excluded.

SCOTT ORR

17. 352 S.W.2d 413, 422 (Spr. Mo. App. 1961).

18. *Metropolitan Life Ins. Co. v. Henkel*, 234 F.2d 69, 71 (4th Cir. 1956), *Life & Cas. Ins. Co. v. Benion*, 82 Ga. App. 571, 573, 61 S.E.2d 579, 581 (1950), both quoting 29A AM. JUR. *Insurance* § 1179, at 320 (1960). *Richards v. Standard Acc. Ins. Co.*, 58 Utah 622, 641, 200 Pac. 1017, 1025 (1921) held, "Unless the deceased intended to produce the very result which occurred, the element of danger is both unimportant and immaterial. . . ." See also 45 C.J.S. *Insurance* § 774, at 805 (1946), which says, "Where, however, the policy does not contain an exposure to danger provision, the element of danger is both unimportant and immaterial, unless the insured intended to produce the very result which occurred."

TORTS—AN EXTENSION OF THE HUMANITARIAN DOCTRINE

*Miller v. St. Louis Pub. Serv. Co.*¹

A collision between plaintiff's automobile and defendant's streetcar occurred at the intersection of Osage and Broadway in St. Louis. While there was some dispute over certain portions of the evidence presented, the court concluded that there was substantial evidence to justify the jury finding these facts: plaintiff had driven east on Osage until he reached the intersection of Broadway. He stopped and looked north and south. He saw no traffic approaching from the north, but the approaching traffic from the south was heavy. He proceeded east until his car straddled the southbound streetcar tracks, where he stopped to wait for an opening in the northbound traffic. He again looked to his left (north) and saw defendant's streetcar about 150 yards north of him stopped at a stop sign. Plaintiff thereafter watched the northbound traffic and did not observe the streetcar. According to the plaintiff, he had been stopped on the tracks for almost a full minute when the streetcar struck his automobile on its left side.

The plaintiff based his claim solely on the theory of humanitarian negligence² and he neither pleaded nor proved any personal injuries. Plaintiff submitted his case on the instruction that the operator of defendant's streetcar ". . . saw, or in the exercise of ordinary care on his part could have seen plaintiff with his automobile in the aforesaid position of imminent peril . . ."³ in time to have stopped the streetcar and avoided the collision.

The jury returned a verdict for plaintiff. The sole issue raised by defendant on appeal was that the humanitarian doctrine (or fourth situation of constructive notice of a mentally oblivious plaintiff)⁴ is not applicable where the only recovery sought is for damage to a chattel. The St. Louis Court of Appeals, in a per curiam decision, affirmed the trial court.⁵

1. 375 S.W.2d 641 (St. L. Mo. App. 1964).

2. The court concluded that the fact situation in the present case constituted a fourth situation humanitarian doctrine of undiscovered mental obliviousness. See note 4 *infra*.

3. *Miller v. St. Louis Pub. Serv. Co.*, *supra* note 1, at 642.

4. The use and meaning of the term "humanitarian doctrine" has been, and to a considerable extent still is, susceptible to two completely different interpretations. For this reason the term "last clear chance" will be used in this note to refer to the three classic last clear chance situations and the term "fourth situation humanitarian doctrine" to refer solely to that peculiarly unique Missouri fourth situation of constructive notice. See Becker, *The Humanitarian Doctrine*, 15 Mo. L. REV. 359, 360 (1950), which distinguishes the factual situations of the three last clear chance situations and the fourth situation humanitarian doctrine. In brief, the three traditional last clear chance situations include:

1. Discovered physical peril.
2. Undiscovered physical peril (where there is a duty of lookout).
3. Discovered mental obliviousness.

The fourth situation humanitarian doctrine involves undiscovered mental obliviousness (where there is a duty of lookout).

5. *Miller v. St. Louis Pub. Serv. Co.*, *supra* note 1. A motion for a rehearing or transfer to the Missouri Supreme Court was denied.

Missouri has "enjoyed" the use of the fourth situation humanitarian doctrine as an extension of the traditional last clear chance doctrine in suits for personal injuries since 1881 (or 1886).⁹ In the noted case the issue of whether the fourth situation humanitarian doctrine applies solely to personal injuries or whether it can also be applied to property damages was placed squarely before a Missouri court for the first time.

Defendant argued that the fourth situation humanitarian doctrine was designed to temper the harsh consequences of contributory negligence. Since its origin and purpose was to permit a person who was injured to recover notwithstanding his contributory negligence, it is a basis for recovery only in suits for personal injuries. In support of this position defendant quotes from *Krause v. Pitcairn*: "... our humanitarian doctrine is reasoned upon precepts on humanity—that tender regard every man must have for the life and limb of other men in times of peace"⁷

The court correctly indicated that the language from the *Krause* case, quoted by defendant in support of his contention came from two other decisions, *Murphy v. Wabash R.R.*⁸ and *Dutcher v. Wabash R.R.*⁹ When those two courts used the term "humanitarian doctrine" they were not using the term to apply solely to the fourth situation but were using it to encompass all four situations. Likewise, the language from the *Sheenin* case¹⁰ also quoted by defendant came from two other cases, *Banks v. Morris & Co.*¹¹ and *Dey v. United Railways Co. of St. Louis*.¹² These cases applied the term "humanitarian doctrine" not in any singular aspect, but rather clearly indicated that their use of the term "humanitarian doctrine" encompassed all four situations. Furthermore, when the courts in the *Murphy*, *Dutcher*, *Dey* and *Banks* cases used the term "humanitarian doctrine" they were considering last clear chance fact situations.

In short, the "humanitarian doctrine" phrases relied upon by defendant to establish his contention that the fourth situation humanitarian doctrine should apply only in cases of personal injury originated and were first applied in cases dealing with last clear chance fact situations and, as used, the language applies to both the last clear chance situations and the fourth situation humanitarian doctrine.

6. There seems to be a difference in opinion among Missouri authorities as to the exact date and exact case that established the fourth situation humanitarian doctrine in Missouri. See Schwartz, *The Questionable Birth of the Missouri Humanitarian Doctrine*, 14 J. Mo. B. 28, 31 (1958), in which *Kelly v. Hannibal & St. Joseph R.R.*, 75 Mo. 138 (1881), is acknowledged the establishing case. See also McCleary, *The Bases of the Humanitarian Doctrine Reexamined*, 5 Mo. L. Rev. 56, 76 (1940), in which Professor McCleary asserts that the decision of *Donohue v. St. Louis, Iron Mountain & Southern Ry.*, 91 Mo. 357, 2 S.W. 424 (1886), established the fourth situation humanitarian doctrine in Missouri.

7. 350 Mo. 339, 350, 167 S.W.2d 74, 78 (En Banc 1942). See also *Sheenin v. St. Louis Pub. Serv. Co.*, 300 S.W.2d 483, 489 (Mo. 1957), for a similar quote relied upon by the defendant.

8. 228 Mo. 56, 80, 128 S.W. 481, 485 (En Banc 1910).

9. 241 Mo. 137, 160, 145 S.W. 63, 69 (En Banc 1912).

10. *Sheenin v. St. Louis Pub. Serv. Co.*, *supra* note 7.

11. 302 Mo. 254, 266, 257 S.W. 482, 484 (En Banc 1924).

12. 140 Mo. App. 461, 467, 120 S.W. 134, 136 (St. L. Ct. App. 1909).

The court in the present case concluded the language relied upon by defendant pertained to all four situations. Therefore, since the last clear chance doctrine has always been applicable to suits for property damages,¹³ this language will not support the argument that the fourth situation humanitarian doctrine should apply *only* to suits for personal injuries.¹⁴

It is noteworthy that all cases cited were railroad cases where the suits were for personal injuries sustained by a plaintiff and caused by the railroad. Even though those courts seem to be generalizing and formulating language to apply under the heading of "humanitarian doctrine" to all four situations, they were applying the language specifically to suits for personal injuries only. Irrespective of the fact that those courts were using the term "humanitarian doctrine" to apply to all four situations, it is rather hard to fathom how the language "tender regard . . . for . . . life and limb . . ." ¹⁵ applies to suits for property damages.

Also, if defendant had been more careful in his selection of case support for his contention he could have cited cases such as *Kelly v. Union Ry.*¹⁶ where the court in speaking of the recently established language of the fourth situation humanitarian doctrine said: "It is a humane rule, conservative of human life and consonant with public policy. It is based upon a recognition of the fact that human beings . . . lose their lives, or sustain great bodily injury . . ." ¹⁷ From this case the defendant could quite convincingly have argued that the original purpose or reason for the adoption of the fourth situation humanitarian doctrine was to give redress for personal injuries notwithstanding the injured person's contributory negligence.

After disposing of defendant's single contention, the court bolstered their conclusion by citing six cases¹⁸ to illustrate that

. . . since *Banks v. Morris & Co.* what we presently call our humanitarian doctrine¹⁹ has been applied or tacitly recognized as applicable where the only recovery sought or allowed was solely for injuries to chattels, without discussion of the issue here presented.²⁰

13. 38 AM. JUR. *Negligence* § 225 (1941); 65 C.J.S. *Negligence* § 136 (1950); Annot., 92 A.L.R. 47, 55 (1934).

14. *Miller v. St. Louis Pub. Serv. Co.*, *supra* note 1, at 645.

15. *Krause v. Pitcairn*, *supra* note 7, at 350, 167 S.W.2d at 78.

16. 18 Mo. App. 151 (St. L. Ct. App. 1885).

17. *Id.* at 156.

18. *Wabash R.R. v. Darren Mills*, 365 Mo. 827, 288 S.W.2d 926 (En Banc 1956); *McKinney v. Robbins*, 273 S.W.2d 513 (Spr. Mo. App. 1954); *Roberts v. Chicago, B&Q R.R.*, 266 S.W.2d 38 (K.C. Mo. App. 1954); *Thomasson v. Henwood*, 235 Mo. App. 1211, 146 S.W.2d 88 (Spr. Ct. App. 1940); *Yontz v. Shernaman*, 94 S.W.2d 917 (K.C. Mo. App. 1936); *Jacobson v. Graham Ship-by-Truck Co.*, 61 S.W.2d 401 (K.C. Mo. App. 1933). The most that can be said of these cases is that some of them grant tacit approval to a suit for property damages under the fourth situation humanitarian doctrine.

19. Here the court uses the term "humanitarian doctrine" to denote the fourth situation humanitarian doctrine.

20. *Miller v. St. Louis Pub. Serv. Co.*, *supra* note 1, at 645. It should be noted that the court could have cited a Missouri case which indirectly permitted a suit under the fourth situation humanitarian doctrine that allowed a recovery of property damages. In *Brungs v. St. Louis Pub. Serv. Co.*, 235 S.W.2d 81

The court advanced one final argument in support of their decision. They reasoned that the same principle of law should apply to both personal injuries and to property damages, that human rights should not prevail over property rights. Since the fourth situation humanitarian doctrine has always been applied to suits for personal injuries, it should likewise apply to suits for property damages to promote uniformity of the law. The court reasoned that it is just as inhumane to damage or destroy a chattel when the injury may be avoided as it is to injure a person; therefore, logic and justice require the uniform application in both situations.

Whether it is just as "inhumane" to damage a chattel as it is to injure a person is, of course, a questionable assertion and necessarily raises a debatable issue. Likewise the assertion that personal rights should not prevail over property rights is open to question.

When this problem of applicability of the fourth situation humanitarian doctrine to suits for property damages is viewed in perspective, two conclusions become rather obvious. First, it seems clear that the fourth situation humanitarian doctrine was originally developed for the purpose of affording relief for personal injuries notwithstanding the fact that the plaintiff was contributorily negligent because of mental obliviousness.

Second, prior to *Banks v. Morris & Co.*²¹ each individual case could be distinguished as involving either mental obliviousness or physical helplessness. Now since: "It is of no consequence what brings about, or continues, the situation of peril. It may be through the obliviousness of the one imperiled, or through his inability to extricate himself from his environment . . ."²² this distinction between mental obliviousness and physical helplessness is no longer necessary. And with this distinction went, for all practical purposes, the traditional distinction between last clear chance situations and the fourth situation humanitarian doctrine. All that is now needed is notice or constructive notice of a position of imminent peril.

(St. L. Mo. App. 1951), a plaintiff recovered both personal and property damages in a humanitarian doctrine action. That suit constituted a factual situation of undiscovered mental obliviousness; however, the issue of property damages was never raised. See also *Finke v. United Film Serv.*, 363 S.W.2d 656 (Mo. 1962), where the plaintiff alleged both personal and property damages and brought suit on both primary and humanitarian doctrine negligence theories. He subsequently abandoned the primary negligence theory and relied entirely on the humanitarian doctrine theory. Although this case does not constitute an application of the fourth situation humanitarian doctrine (the facts seem to indicate it was a last clear chance situation of undiscovered peril) it is easy to see how the same result could come about with a fourth situation humanitarian doctrine factual situation.

21. 302 Mo. 254, 257 S.W. 482 (En Banc 1924).

22. *Banks v. Morris & Co.*, *supra* note 21, at 267, 257 S.W. at 484. In conjunction with this statement the court in the *Banks* case established a five-fold test to determine whether a cause of action would arise under a given state of facts:

(1) Plaintiff was in a position of peril; (2) defendant had notice thereof (if it was the duty of defendant to have been on the lookout, constructive notice suffices); (3) defendant after receiving such notice had the present ability, with the means at hand, to have averted the impending injury without injury to himself or others; (4) he failed to exercise ordinary care to avert such impending injury; and (5) by reason thereof plaintiff was injured.

The Missouri courts have simply expanded the use of the term "humanitarian doctrine" from its original applicability to the fourth situation of constructive notice of mental obliviousness.²³ Since the *Banks* decision its use has become that of an all inclusive term which, when applied to the present test of position of imminent peril, encompasses all four previously distinguishable situations.

True, the language of the *Banks* case requires "(5) by reason thereof plaintiff was injured."²⁴ However that language necessarily includes recovery for property damage under previously distinguishable last clear chance situations (which has always been recognized).²⁵ Therefore it would seem that the language also includes recovery for property damage under a previous fourth situation humanitarian doctrine factual situation. Since, pursuant to *Banks*, it is no longer necessary to distinguish between last clear chance situations and the fourth situation humanitarian doctrine why, or how, distinguish when property damages are recoverable?²⁶

Therefore if the term "humanitarian doctrine" is equated with the fourth situation humanitarian doctrine that required a mentally oblivious plaintiff and was originated to afford this oblivious plaintiff a remedy for his personal injuries, the present decision cannot be sound. However, the *Banks* decision resulted in the fusion of the three traditional last clear chance situations and the fourth situation humanitarian doctrine into a requirement of only discovery (or constructive discovery) of a position of imminent peril. Therefore, historical or original intent of the fourth situation humanitarian doctrine notwithstanding, the present case presents simply another step in the evolution of this theory of recovery.

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23. *Supra* note 4.

24. *Supra* note 22.

25. *Supra* note 13.

26. See §§ 17.14 and 17.15 of Missouri Approved Jury Instructions (1964) where the *Banks* language is accepted and no distinction drawn between mental obliviousness and physical helplessness. The two terms are not used. The instructions instead speak of "immediate danger."